1997

Tyler Munns v. The State of Utah : Brief of Appellant

Utah Court of Appeals

Kelly Cardon; Attorney for Appellant.
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IN THE COURT OF APPEALS OF THE STATE OF UTAH

TYLER MUNNS,	:	
Appellant,	:	Case No. 970084-CA
vs.	:	
STATE OF UTAH,	:	Priority No. 15
Appellee.	:	

BRIEF OF APPELLANT

AN APPEAL FROM AN ORDER DENYING APPELLANT'S MOTION TO SUPPRESS AND DISMISS FROM THE SECOND JUDICIAL DISTRICT COURT, LAYTON DEPARTMENT, DAVIS COUNTY, STATE OF UTAH

The Honorable Alfred C. Van Wagenen, Presiding

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JURISDICTIONAL STATEMENT

The jurisdiction is proper before this Court under the provisions of §78-2a-3, Utah Code Annotated, as amended.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Appellant's issue for review is whether there was reasonable suspicion to believe that a crime was being committed when the officer initiated the traffic stop of Appellant's vehicle.

The standard of review relevant to this decision is that this "is a determination of law and is reviewed for correctness. No particular deference is accorded the trial court's determination". **State v. Pena**, 869 P.2d 932, 939 (Utah 1994).

This issue was properly preserved by the trial Court as is set forth in Appellant's Response to Sua Sponte Motion for Summary Disposition, the parties Affidavit and the Affidavit of the Honorable Alfred C. Van Wagenen filed with this Court.

Appellant relies upon the interpretation of the following as being determinative of his appeal: Fourth Amendment to the United States Constitution; §77-7-15, U.C.A. 1953, as amended; and §41-6-44.20 U.C.A. 1953, as amended. (Attached as Addendum 1).

Further, Appellant asserts that an independent issue exists relative to the Trial Court's behavior at the Suppression Hearing concerning inattentiveness and prejudice toward Appellant's case. The issue is whether Appellant was denied a fair and impartial hearing by the Court.

STATEMENT OF THE CASE

On or about January 20, 1996, the State of Utah charged Appellant with the crime of Operating or Being in Actual Physical Control of a Vehicle While Under the Influence of Alcohol pursuant to Section 41-6-44, U.C.A. 1953, as amended. Record pp. 4-6.

On or about September 19, 1996, Appellant moved to have the evidence suppressed and the charge dismissed by the Trial Court on the basis that the stop of Appellant's vehicle was not based on reasonable suspicion that Appellant had committed or was about to commit a crime as required under Utah law. Record pp. 13-14.

On or about December 6, 1996, Appellant's Motion to Suppress and Dismiss was heard and denied by the Honorable Alfred C. Van Wagenen. Record pp. 15, 29-70.

STATEMENT OF THE FACTS

On or about January 20, 1996, Appellant was travelling southbound on Main Street approaching the intersection of 2000

North in Sunset, Utah. Officer Bruce Arbogast, of the Sunset Police Department was stopped northbound in the left turn lane on Main Street at the intersection of 2000 North in Sunset, Utah. Formal Information, Record pp. 4-6; Transcript of Suppression Hearing, Record p. 4.

At the time of this incident, Officer Arbogast had only been an officer for approximately six months. Transcript of Suppression Hearing, Record p. 10.

Officer Arbogast testified that he made his stop solely based on his observation that Appellant was drinking from a dark brown bottle. Transcript of Suppression Hearing, Record p. 44.

Officer Arbogast testified that had an occupant of Appellant's vehicle, such as a child been drinking from a brown bottle, he would not have suspected that it was a beer. Transcript of Suppression Hearing, Record p. 58.

Officer Arbogast testified that he observed Appellant drinking a dark colored bottle with a wrapper on it and that made him believe that it was an alcoholic beverage. Transcript of Suppression Hearing, Record p. 34.

When Officer Arbogast was asked whether he was able to tell what kind of label was on the bottle, he testified that he could see some colors, but at the time, he could only probably guess, he wasn't exactly sure what it was. Transcript of Suppression Hearing, Record p. 40.

When asked to describe the side of the bottle, Officer Arbogast testified that it was "a standard bottle size for alcohol". Transcript of Suppression Hearing, Record p. 34-35.

Officer Arbogast testified that he is not a drinker (referring to alcohol), but that he was guessing that a standard size bottle for "alcohol" is probably seven to eight inches tall, but isn't sure. Officer Arbogast could not answer how many ounces would be in a bottle of that size, but guessed it would be anywhere from up to twelve ounces. Transcript of Suppression Hearing, Record p. 41-42.

In spite of testimony relating to an unfamiliarity with soda and beer bottles, Officer Arbogast testified that most of the soda pop bottles, root beer or ice tea bottles are the same size as the beer bottle recovered in this case. Transcript of Suppression Hearing, Record p. 43-44.

Officer Arbogast testified that he had investigated approximately 10 cases at the time of the suppression hearing involving recovery of brown bottles, which were beer bottles. This 10 case experience came after he had been an officer for approximately 18 months. He had only been an officer for approximately 6 months at the time of this stop and had significantly less experience. Transcript of Suppression Hearing, Record pp. 7, 67.

Officer Arbogast estimated Appellant was travelling approximately 7 miles per hour at the time of the observation. Transcript of Suppression Hearing, Record p. 40.

Officer Arbogast testified his observation was made through Appellant's driver's side window as Appellant was passing him on the roadway. Transcript of Suppression Hearing, Record pp. 50, 53.

Officer Arbogast testified Appellant's truck had a camper on it and side mirrors mounted on the doors. Officer Arbogast's observation was made after had passed the patrol vehicle far enough so that the side mirrors were not blocking the officer's view into the driver's side window. Transcript of Suppression Hearing, Record pp. 50-51.

Officer Arbogast testified that Appellant's driver's side window was approximately two to two and a half feet wide. Transcript of Suppression Hearing, Record p. 51.

Officer Arbogast testified that it would take a vehicle travelling seven to ten miles per hour probably under a second or two to travel five feet. Officer Arbogast testified his observation of Appellant through the driver's side window lasted more than one second. Transcript of Suppression Hearing, Record p. 52.

Officer Arbogast testified that he had suspicions that Appellant was drinking a Budweiser beer, but couldn't tell that

that was exactly what it was. Officer Arbogast believed that he saw Appellant drinking an "alcoholic beverage". Transcript of Suppression Hearing, Record p. 54.

Officer Arbogast testified that the thought of whether the bottle could have possibly been a root beer bottle did not enter his mind at the point from when he initiated the stop. He testified that he had it in his mind that it was an "alcoholic beverage". Transcript of Suppression Hearing, Record pp. 54-55.

Officer Arbogast testified that he did not include an indication in his report identifying the bottle as brown. Officer Arbogast testified that he did not include an indication in his report that the bottle had a red and white label. Officer Arbogast testified to these details approximately 11 months after the arrest. Formal Information, Record p 4-6; Transcript of Suppression Hearing, Record pp. 1,44,53.

SUMMARY OF ARGUMENTS

I.

WHETHER THERE WAS REASONABLE SUSPICION TO BELIEVE THAT A CRIME WAS BEING COMMITTED WHEN THE OFFICER INITIATED THE TRAFFIC STOP OF APPELLANT'S VEHICLE.

Appellant contends that Officer Arbogast did not have reasonable suspicion that Appellant was engaged in illegal conduct. Officer Arbogast's conduct violated Appellant's right under the Fourth Amendment to the United States Constitution.

II.

WHETHER APPELLANT WAS DENIED A FAIR AND IMPARTIAL HEARING BY THE COURT.

Appellant contends that the Honorable Alfred C. Van Wagenen was inattentive at trial, did not allow Appellant's counsel equitable opportunity to present his case as is shown in the record.

ARGUMENT

I.

WHETHER THERE WAS REASONABLE SUSPICION TO BELIEVE THAT A CRIME WAS BEING COMMITTED WHEN THE OFFICER INITIATED THE TRAFFIC STOP OF APPELLANT'S VEHICLE.

It is clear from the testimony at the Suppression Hearing, that the sole basis for Officer Arbogast's stop is that he observed Appellant take a drink from a brown colored bottle when he glimpsed at Appellant as Appellant was passing the officer's patrol car at an estimated speed of seven miles per hour, which would equate to a rate of ten feet per second. Upon making that instant observation, Officer Arbogast merely suspicioned that the unidentified brown bottle was a beer bottle and proceeded to initiate a stop presumably based upon a violation of the Open Container law.

> "Stopping of a vehicle and consequent detention of its occupants constitutes a seizure within the meaning of the Fourth Amendment, even if the purpose of the stop is limited and the resulting detention brief." **U.S.C.A. Const.Amend. 4.**

The Utah Supreme Court has held:

> "An officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."" **State v. Steward**, 806 P.2d 213 (Utah Ap. 1991) citing **State v. Deitman**, 739 p.2D 616, 617-18 (Utah 1987) (per curiam) (quoting **U.S. v. Merritt**, 735 F.2d 223, 230 (4th Cir. 1984)).

In determining the existence of reasonable suspicion, a court must look at the totality of the circumstances. **State v. Steward**, 806 P.2d 213, 215 (Utah App. 1991)

In the case at hand, it is clear that Officer Arbogast did not have articulable suspicion that Appellant had committed or was about to commit a crime based upon the officer's suspicion that Defendant was consuming alcohol merely because he was drinking from a brown colored bottle.

In the **State v. Sery**, 758 P.2d 935 (Utah App. 1988), the court indicated:

> "...the courts are not relieved of their duty to... decide whether the particular observation bears any reasonable correlation to a suspicion that the person presently is engaged in criminal activity." **Sery** citing **U.S. v. Sokolow, 831 F.2d 1413, 1418 (9th Cir. 1987)**

In the **U.S. v. Nicholas**, 104 F.3d 368, 1996 WL 731605 (10th Cir. (Utah)), (unpublished disposition attached as Addendum 1), the officer initiated his stop because he thought the driver of the vehicle may have been drinking. He based his suspicion on

his observation that someone got out of the car with what the officer thought to be an open container.

> "An officer's unparticularized suspicion or hunch cannot create circumstances giving rise to reasonable suspicion." **Nicholas** citing **U.S. v. Fernandez**, 18 F.3d 874, 878 (10th Cir. 1994)
>
> "[s]ome facts must be outrightly dismissed as so innocent or susceptible to varying interpretations as to be innocuous." **Nicholas** citing **U.S. v. Lee**, 73 F.3d 1034 (10th Cir. 1996).

In **Nicholas** it was determined by the Court that the officer stopped Defendant because he believed he might have been drinking, which must have meant he stopped Defendant because he suspected he was driving under the influence of alcohol. As in the instant case, the officer in **Nicholas** described no driving pattern to support an inference that Defendant was driving under the influence of alcohol. The court found that the evidence in that case simply did not support a determination that at the time of the initial stop, the officer had reasonable particularized suspicion Defendant had committed or was committing a crime.

In the instant case, the officer had no opportunity to evaluate Appellant's demeanor, his driving pattern or any other circumstance upon which to base his stop prior to initiating the same. Appellant was stopped solely on the basis that the officer observed him drinking from a "brown bottle". His observation was merely as to the color of the bottle, not even to the type or size of bottle. The officer's testimony is clear that he had no

certainty that the bottle was in fact a bottle containing alcohol, but suspicioned that it was an "alcoholic beverage" and proceeded to initiate the stop. The officer also testified that he does not drink alcohol, he does not drink soda, teas or other such beverages and is not familiar with their bottles. He further indicated that he believed the bottle he observed Appellant drinking from was a "standard" size bottle for alcohol, yet the officer is not a consumer of alcoholic or other types of bottled beverages. The "standard" size bottle Officer Arbogast refers to is also a standard size bottle for root beer, which is also available in brown bottles. "Alcohol" is available in a vast variety of bottles of different shapes, sizes and colors with a variety of different labels, whether it is purchased from a State Liquor Store or from a local grocery store. Soda pop, iced tea and bottled waters are also available in a vast variety of bottles of different shapes, sizes and colors with a variety of different labels. Many of these products, alcoholic and non-alcoholic, resemble each other. Many of the products, alcoholic and non-alcoholic, are available in brown or dark colored bottles or are a brown liquid with the appearance of being a dark colored or brown bottle. Non-alcoholic beer is available to the general public and is in brown or dark colored bottles.

Had Officer Arbogast observed a bottle unique to types of alcohol, such as a "fifth" of alcohol or a quart beer bottle, he

may have had a basis for reasonable suspicion. However, his observance of a "brown bottle" could have been one of many non-alcoholic beverages.

As previously indicated, Officer Arbogast had no other basis for his stop such as his observation of Appellant's demeanor or driving pattern to allow the totality of the circumstances to be analyzed. The totality of the circumstances in this case is simply that Officer Arbogast believed his observation of a "brown colored bottle" was reasonable suspicion for which to stop Appellant.

The general public consumes these beverages while driving their vehicles. There must be some other attendant facts indicating that the Open Container law is being broken such as behavior, driving pattern, or at least a specific identification of the beverage. If we accept that Officer Arbogast's hunch was justified as reasonable suspicion to stop Appellant, we diminish the standard the law has upheld and expose virtually every citizen of being invaded and having their constitutional right violated for drinking a beverage in their vehicle, which may possibly resemble an alcoholic beverage. This diminished standard could also be applied to beverage cans and allow an officer the right to seize a citizen for consuming a Diet Coke merely because the can has red, silver and white markings such as

a Budweiser beer can had the officer suspicioned that it was a Budweiser can.

Furthermore, it would diminish the standard of reasonable suspicion for any stop and would theoretically allow citizens to be seized for smoking a pipe, a hand-rolled cigarette, or even a cigarette that the officer thought was hand-rolled, with the justification that the officer suspicioned the pipe or rolled cigarette contained an illegal chemical substance such as marijuana. This analogy can then be applied to many innocent acts and allow every citizen to be seized because the innocent act they are engaging in could conceivably be deemed to be illegal. This would virtually terminate every citizens protection against illegal seizure under the Fourth Amendment of the Constitution.

II.

WHETHER APPELLANT WAS DENIED A FAIR AND IMPARTIAL HEARING BY THE COURT.

At the Suppression Hearing regarding this matter, the Honorable Alfred C. Van Wagenen, after further redirect examination, specifically refused Appellant's counsel opportunity to address the State's examination. When Appellant's counsel

requested the opportunity to address said examination, Judge Van Wagenen addressed Appellant's counsel as follows:

> **THE COURT: No, you don't get one more. You've had enough. You've had enough. Haven't you really?**

Transcript of Suppression Hearing, Record p. 58.

In addition, after lengthy, detailed direct examination and cross examination of Officer Arbogast at the Suppression Hearing, the Court asked the following:

> **THE COURT: Can you describe the wrapper a little bit that was on the bottle?**
>
> **THE WITNESS: Yes.**
>
> **THE COURT: It is like a brown paper bag? It's not.**
>
> **THE WITNESS: No...**

Transcript of Supression Hearing, Record P. 48.

These remarks by the Trial Court and other indications of inattentiveness are reflective of the fact that Appellant did not receive a fair and impartial hearing. It was clear that the Court was not interested in hearing further testimony in Appellant's defense and had reached the decision against Appellant before Appellant had the opportunity to properly present his defense.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests this Court to reverse the trial court's decision and remand this case to the trial court.

RESPECTFULLY SUBMITTED this 18 day of June, 1997.

KELLY G. CARDON
Attorneys for Appellant

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing BRIEF OF APPELLANT was mailed, postage prepaid, to the Davis County Attorney, P.O. Box 618, Farmington, Utah 84025 on the 3rd day of June, 1997.

KELLY G. CARDON

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing BRIEF OF APPELLANT was mailed, postage prepaid, to the Davis County Attorney, P.O. Box 618, Farmington, Utah 84025.

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in conformance with prescribed methods, 96 A.L.R.3d 745.

Request before submitting to chemical sobriety test to communicate with counsel as refusal to take test, 97 A.L.R.3d 852.

Request for prior administration of additional test as constituting refusal to submit to chemical sobriety test under implied consent law, 98 A.L.R.3d 572.

Drunk driving: motorist's right to private sobriety test, 45 A.L.R.4th 11.

Sufficiency of showing of physical inability to take tests for driving while intoxicated to justify refusal, 68 A.L.R.4th 776.

Challenges to use of breath tests for drunk drivers based on claim that partition or conversion ratio between measured breath alcohol and actual blood alcohol is inaccurate, 90 A.L.R.4th 155.

41-6-44.11. Repealed.

Repeals. — Laws 1991, ch. 268, § 49 repeals § 41-6-44.11, as enacted by L. 1990, ch. 49, § 1, establishing an alcohol and drug testing fee, effective January 1, 1992.

41-6-44.20. Drinking alcoholic beverage and open containers in motor vehicle prohibited — Definitions — Exceptions.

(1) A person may not drink any alcoholic beverage while operating a motor vehicle or while a passenger in a motor vehicle, whether the vehicle is moving, stopped, or parked on any highway.

(2) A person may not keep, carry, possess, transport, or allow another to keep, carry, possess, or transport in the passenger compartment of a motor vehicle, when the vehicle is on any highway, any container which contains any alcoholic beverage if the container has been opened, its seal broken, or the contents of the container partially consumed.

(3) In this section:

(a) "Alcoholic beverage" has the meaning given in Section 32A-1-105.

(b) "Chartered bus" has the meaning given in Section 32A-1-105.

(c) "Limousine" has the meaning given in Section 32A-1-105.

(d) "Passenger compartment" means the area of the vehicle normally occupied by the operator and passengers and includes areas accessible to them while traveling, such as a utility or glove compartment, but does not include a separate front or rear trunk compartment or other area of the vehicle not accessible to the operator or passengers while inside the vehicle.

(4) Subsections (1) and (2) do not apply to passengers in the living quarters of a motor home or camper.

(5) Subsection (2) does not apply to passengers traveling in any licensed taxicab or bus.

(6) Subsections (1) and (2) do not apply to passengers who have carried their own alcoholic beverage onto a limousine or chartered bus that is in compliance with Subsections 32A-12-213(1)(b) and (c).

History: C. 1953, 41-6-44.20, enacted by L. 1981, ch. 272, § 1; 1987, ch. 92, § 55; 1987, ch. 138, § 42; 1990, ch. 23, § 188.

Amendment Notes. — The 1990 amendment, effective February 21, 1990, substituted "Section 32A-1-105" for "Section 32A-1-5" at the end of Subsection (3)(a); added present Subsections (3)(b) and (3)(c); redesignated former Subsection (3)(b) as Subsection (3)(d); and added Subsection (6).

Cross-References. — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

COLLATERAL REFERENCES

Am. Jur. 2d. — 7A Am. Jur. 2d Automobiles and Highway Traffic § 311.
A.L.R. — Validity of statute or ordinance making it an offense to consume or have alcoholic beverages in open package in motor vehicle, 57 A.L.R.3d 1071.

41-6-44.30. Seizure and impoundment of vehicles by peace officers — Impound requirements — Removal of vehicle by owner.

(1) (a) If a peace officer arrests or cites the operator of a vehicle for violating Section 41-6-44 or 41-6-44.10, or a local ordinance similar to Section 41-6-44 which complies with Subsection 41-6-43(1), the officer shall seize and impound the vehicle, except as provided under Subsection (2).

(b) A vehicle seized and impounded under this section shall be moved by a peace officer or by a tow truck that meets the standards established:

(i) by the department under Subsection 41-6-102(4)(b);

(ii) under Title 41, Chapter 6, Article 18, Tow Truck and Impound Regulation Act; and

(iii) the Public Service Commission under Section 54-6-42.5.

(2) If a registered owner of the vehicle, other than the operator, is present at the time of arrest, the officer may release the vehicle to that registered owner, but only if the registered owner:

(a) requests to remove the vehicle from the scene;

(b) presents to the officer a valid operator's license and sufficient identification to prove ownership of the vehicle;

(c) complies with all restrictions of his operator's license; and

(d) would not, in the judgment of the officer, be in violation of Section 41-6-44 or 41-6-44.10, or a local ordinance similar to Section 41-6-44 which complies with Subsection 41-6-43(1), if permitted to operate the vehicle, and if the vehicle itself is legally operable.

(3) (a) The peace officer or agency by whom the officer is employed shall, within 24 hours after the seizure, notify the Motor Vehicle Division of the seizure and impoundment.

(b) The notice shall state:

(i) the operator's name;

(ii) a description of the vehicle;

(iii) its identification number, if any;

(iv) its license number;

(v) the date, time, and place of impoundment;

(vi) the reason for impoundment; and

(vii) the name of the garage or place where the vehicle is stored.

(4) Upon receipt of notice, the Motor Vehicle Division shall give notice to the registered owner of the vehicle in the manner prescribed by Section 41-1a-114. The notice shall:

(a) state the date, time, and place of impoundment, the name of the person operating the vehicle at the time of seizure, if applicable, the reason for seizure and impoundment, and the name of the garage or place where the vehicle is stored;

(b) state that the registered owner is responsible for payment of towing, impound, and storage fees charged against the vehicle; and

burden to show reasonable and probable cause for believing items offered for sale had been unlawfully taken by the detained or arrested person; this section in essence codifies the pre-existing common law defense of probable cause to effect an arrest and expands it to incorporate specific private persons in the shoplifting context. Terry v. Zions Co-op. Mercantile Inst., 605 P.2d 314 (Utah 1979).

Evidence of prior conviction.

Where customer sued merchant for malicious prosecution, false arrest and false imprisonment arising from alleged shoplifting incident and introduced evidence the incident left her severely depressed and suicidal, merchant which wished to introduce evidence of a prior shoplifting conviction and its surrounding facts as affecting the issue of damages was properly restricted to showing fact of the prior act and the identity of the party involved in view of, inter alia, the similarity of the incidents and substantial likelihood of confusing the jury. Terry v. Zions Co-op. Mercantile Inst., 605 P.2d 314 (Utah 1979).

Liability.

—*Acquittal.*

Store that had probable cause to detain suspected shoplifter's sister was not liable for false arrest even though sister was subsequently acquitted of shoplifting charge. Davis v. Zions Co-op. Mercantile Inst., 29 Utah 2d 336, 509 P.2d 362 (1973).

Motive for arrest.

Section offered no civil immunity to a merchant who initiated a customer's arrest for purpose of effecting a civil remedy to collect money owed, even if the money was lawfully owed; thus section did not shield auto dealer from liability for false imprisonment where customer drove away in new truck after leaving check for less than purchase price dealer was demanding and dealer called police and asked that truck be picked up, saying there had been a theft. Greenwell v. Canyon Lincoln Mercury, Inc., 575 P.2d 688 (Utah 1978).

Probable cause.

—Specific cases.

There was sufficient evidence upon which to base a jury verdict denying damages for false arrest, where plaintiff, an eighteen-year-old motorcycle rider, had placed a small article of merchandise in his helmet, justifying a reasonable suspicion that he was shoplifting. Fuller v. Zinik Sporting Goods Co., 538 P.2d 1036 (Utah 1975).

—Standard.

The standard applicable to detentions and arrests by merchants is composed of both subjective and objective elements; the merchant must allege and prove not only that he believed in good faith that his conduct was lawful, but also that his belief was reasonable; even if the *crime was not in fact being committed or attempted*, if the merchant in good faith believes that such facts are present as to lead him to an honest conclusion that a crime is being committed by the person to be arrested then he may not be held liable for false arrest. In determining the reasonableness of the conclusion, the test to be applied is one that is practical under the circumstances, i.e., whether a reasonable and prudent man in his position would be justified in believing facts which would warrant making the arrest. Terry v. Zions Co-op. Mercantile Inst., 605 P.2d 314 (Utah 1979).

COLLATERAL REFERENCES

Am. Jur. 2d. — 32 Am. Jur. 2d False Imprisonment §§ 44 et seq., 66.

C.J.S. — 35 C.J.S. False Imprisonment §§ 14, 21 to 25, 40(4) to (7).

A.L.R. — Defamation: actionability of accusation or imputation of shoplifting, 29 A.L.R.3d 961.

Admissibility of defendant's rules or instructions for dealing with shoplifters in action for false imprisonment or malicious prosecution, 31 A.L.R.3d 705.

Construction and effect in false imprisonment action of statute providing for detention of suspected shoplifters, 47 A.L.R.3d 998.

Changing the price tags by patron in self-service store as criminal offense, 60 A.L.R.3d 1293.

Key Numbers. — False Imprisonment ⚭ 2, 10, 13, 15.

77-7-15. Authority of peace officer to stop and question suspect — Grounds.

A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing

or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

History: C. 1953, 77-7-15, enacted by L. 1980, ch. 15, § 2.

NOTES TO DECISIONS

ANALYSIS

Alcohol use by minor.

Defendant's young appearance and the smell of alcohol on defendant's breath gave police officer a reasonable articulable suspicion, based on objective evidence, that the defendant had consumed alcohol and was a minor. State v. Bean, 869 P.2d 984 (Utah Ct. App. 1994).

Avoiding roadblock.

Avoiding a roadblock, even assuming its legality, without more, does not create an articulable suspicion that the occupants have engaged in or are about to engage in criminal activity. The act merely demonstrates a desire to avoid police confrontation, and at best only gives rise to a hunch that criminal activity may be afoot. State v. Talbot, 792 P.2d 489 (Utah Ct. App. 1990).

Basis of suspicion.

The reasonable, articulable suspicion contemplated in this section must be based on objective facts suggesting that the individual may be involved in criminal activity. State v. Menke, 787 P.2d 537 (Utah Ct. App. 1990).

In order to conclude that there was reasonable suspicion to justify stopping defendant, an officer must be able to articulate some unlawful or suspicious behavior connecting the detainee to the suspected criminal activity. State v. Potter, 863 P.2d 40 (Utah Ct. App. 1993).

When a reliable source with reasonable suspicion based on articulable facts reports the commission of a crime and, based on the relayed facts, the dispatcher communicates the information to the police, and the responding officer's own observations corroborate the dispatch, reasonable suspicion exists for a stop. State v. Roth, 827 P.2d 255 (Utah Ct. App. 1992).

Court's findings.

Trial court erred in ruling that a city police officer had a reasonable suspicion to justify seizing defendant, who was seen emerging from a 24-hour grocery store at 3:30 a.m., where the court made only a conclusory finding that defendant's answers to questions regarding the ownership of a vehicle in the store parking lot were "inconsistent, vague and suspicious." State v. Munsen, 821 P.2d 13 (Utah Ct. App. 1991).

Drug use.

When an officer saw defendant smoking a cigarette, which from her training and experience she recognized as a marijuana "joint," while the defendant was in a vacant parking lot in his vehicle with the windows rolled up on a warm day, even though the defendant's activity was conceivably consistent with innocent activity, it was strongly indicative of criminal activity and the officer had reasonable grounds to stop the vehicle and investigate further. Provo City Corp. v. Spotts, 861 P.2d 437 (Utah Ct. App. 1993).

No reasonable suspicion.

Where suspects were detained on the basis of a description by a fellow officer who had seen them walking in the vicinity of a burglary, and where the suspects were not observed at the scene of the crime, or engaging in unlawful or suspicious activity, the "reasonable suspicion" test was not met. State v. Swanigan, 699 P.2d 718 (Utah 1985).

Detention of defendant on a city street at 3:30 a.m. was unreasonable where the initial decision to stop was based merely on the lateness of the hour and the high-crime factor in the area, and defendant's "nervous" conduct was consistent with innocent as well as with criminal behavior. State v. Trujillo, 739 P.2d 85 (Utah Ct. App. 1987).

Seizure of defendant's automobile was invalid, where his initial stop for driving in the left lane had been used as a pretext to support the arresting officer's "hunch" that defendant was engaged in illegal activity. State v. Sierra, 754 P.2d 972 (Utah Ct. App. 1988).

No reasonable suspicion of criminal activity. See State v. Sery, 758 P.2d 935 (Utah Ct. App. 1988).

The defendant's brief visit to a house under surveillance because of a suspicion of drug trafficking was not a sufficient basis for an officer to stop the defendant's vehicle after her departure from the house. The facts were not sufficient to give the officer an articulable suspicion that the defendant had engaged in criminal activity. State v. Sykes, 840 P.2d 825 (Utah Ct. App. 1992).

Out-of-state licenses.

An officer had no reasonable suspicion to make an investigatory stop based merely on the fact that a car with out-of-state license plates was moving slowly through a neighborhood late at night. State v. Carpena, 714 P.2d 674 (Utah 1986).

Prostitution.

Police officers who observed a woman standing on a sidewalk talking to the male occupant of a pickup truck, and who believed that a prostitution deal had been made, were authorized to investigate more fully by interviewing the occupants of the vehicle. State v. Holmes, 774 P.2d 506 (Ct. App. 1989).

Revoked license.

Police officers had reasonable suspicion to make an investigatory stop of defendant's vehicle, where they knew that defendant's driver's license had been revoked and that his passenger was sought on an arrest warrant. State v. Constantino, 732 P.2d 125 (Utah 1987).

Standard.

In traffic violation stops, in balancing the rights of individuals to be free from arbitrary interference by law enforcement officers and the government's interest in crime prevention and public protection, if a hypothetical reasonable police officer would not have stopped the driver for the cited traffic offense, and the surrounding circumstances indicate the stop is a pretext, the stop is unconstitutional. State v. Sierra, 754 P.2d 972 (Utah Ct. App. 1988).

Suspected shoplifting.

Defendant's pre-arrest seizure was valid, where he was seen by police officers near a shopping mall entrance removing a box from beneath his shirt, and his actions in transferring the box's contents into a bag strongly suggested shoplifting. State v. Menke, 787 P.2d 537 (Utah Ct. App. 1990).

Vehicles.

Evidence sufficient to conclude that the occupants of a vehicle may have been engaged in criminal activity. State v. Baumgaertel, 762 P.2d 2 (Utah Ct. App. 1988).

Cited in Bountiful City v. Maestas, 788 P.2d 1062 (Utah Ct. App. 1990); State v. Davis, 821 P.2d 9 (Utah Ct. App. 1991); State v. Leonard, 825 P.2d 664 (Utah Ct. App. 1991).

COLLATERAL REFERENCES

Utah Law Review. — The Police Dog: Possibilities for Abuse in Finding Probable Cause for Arrest, 1969 Utah L. Rev. 408.

C.J.S. — 6A C.J.S. Arrest §§ 38 to 42.

77-7-16. Authority of peace officer to frisk suspect for dangerous weapon — Grounds.

A peace officer who has stopped a person temporarily for questioning may frisk the person for a dangerous weapon if he reasonably believes he or any other person is in danger.

History: C. 1953, 77-7-16, enacted by L. 1980, ch. 15, § 2.

NOTES TO DECISIONS

ANALYSIS

Interpretation of section.

This section must be interpreted to meet the constitutional requirements of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). State v. Roybal, 716 P.2d 291 (Utah 1986).

Reasonable belief test.

In assessing the reasonableness of the officer's actions, it is not essential that the officer actually be in fear, nor need he be absolutely certain that the individual is armed. The issue is whether a reasonably prudent man in the circumstances would be warranted in the belief

History: C. 1953, 77-7-6, enacted by L. 1980, ch. 15, § 2; 1995, ch. 118, § 1.

Amendment Notes. — The 1995 amendment, effective May 1, 1995, redesignated Subsections (1), (2), and (3) as (1)(a), (1)(b), and (1)(c), added new Subsection (2), and made a minor punctuation change.

77-7-15. Authority of peace officer to stop and question suspect — Grounds.

NOTES TO DECISIONS

ANALYSIS

Basis of suspicion.
No reasonable suspicion.
Standard.
Vehicles.
— Possible hidden compartment.

Basis of suspicion.

This section contemplates that an officer may complete a non-consensual investigative stop and stay within the boundaries drawn by the constitution if the officer is able to point to objective, specific, and articulable facts that warrant the intrusion upon the person. State v. Contrel, 886 P.2d 107 (Utah Ct. App. 1994), cert. denied, 899 P.2d 1231 (Utah 1995).

No reasonable suspicion.

In the absence of any evidence concerning the factual basis for the radioed instruction on which the investigating officer acted, the state failed to meet its burden of establishing facts supporting the reasonable, articulable suspicion necessary to stop defendant's vehicle. State v. Case, 884 P.2d 1274 (Utah Ct. App. 1994).

Standard.

While the required level of reasonable suspicion is lower than the standard required for probable cause to arrest, the same totality of facts and circumstances approach is used to determine if there are sufficient "specific and articulable facts" to support reasonable suspicion. State v. Contrel, 886 P.2d 107 (Utah Ct. App. 1994), cert. denied, 899 P.2d 1231 (Utah 1995).

Vehicles.

— Possible hidden compartment.

Objective facts upon which officer's suspicions were based, including an apparent substantial structural modification of defendant's pickup truck in order to conceal a hidden compartment, supported a reasonable suspicion that defendant was involved in criminal activity. State v. Contrel, 886 P.2d 107 (Utah Ct. App. 1994), cert. denied, 899 P.2d 1231 (Utah 1995).

77-7-19. Appearance required by citation — Arrest for failure to appear — Transfer of cases — Motor vehicle violations — Disposition of fines and costs.

(1) Persons receiving misdemeanor citations shall appear before the magistrate designated in the citation on or before the time and date specified in the citation unless the uniform bail schedule adopted by the Judicial Council or Subsection 77-7-21(1) permits forfeiture of bail for the offense charged.

(2) A citation may not require a person to appear sooner than five days or later than 14 days following its issuance.

(3) A person who receives a citation and who fails to comply with Section 77-7-21 on or before the time and date and at the court specified is subject to arrest. The magistrate may issue a warrant of arrest.

(4) Except where otherwise provided by law, a citation or information issued for violations of Title 41 shall state that the person receiving the citation or information shall appear before the magistrate who has jurisdiction over the offense charged.

(5) Any justice court judge may, upon the motion of either the defense attorney or prosecuting attorney, based on a lack of territorial jurisdiction or the disqualification of the judge, transfer cases to a justice court with territorial jurisdiction or the district court within the county.

Tab 2

104 F.3d 368 (Table)
97 CJ C.A.R. 30
Unpublished Disposition
(Cite as: 104 F.3d 368, 1996 WL 731605 (10th Cir.(Utah)))

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
John Bradley NICHOLAS,
Defendant-Appellant.

No. 96-4022.
(D.C.No.94-CR-3)

United States Court of Appeals, Tenth Circuit.

Dec. 20, 1996.

Before PORFILIO, HOLLOWAY, and BRISCOE, Circuit Judges.

ORDER AND JUDGMENT [FN1]

FN1. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

****1** Defendant appeals the district court's decision denying his motion to suppress evidence seized during the course of a traffic stop. Following the court's ruling, defendant entered a conditional guilty plea to possession of a controlled substance with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and receipt of a firearm by a restricted person in violation of 18 U.S.C. § 922(n). On appeal, defendant argues the police officers' conduct violated the Fourth Amendment because it was not justified at its inception and was not reasonably related in scope to the surrounding circumstances. We believe the record fails to support the district court's finding the defendant's initial stop was reasonable and reverse.

At 5:30 am on December 19, 1993, Officer Lance London, patrolling in the city of South Ogden, Utah, noticed a car parked in the lot of an all-night bowling alley. He observed a passenger exit from the car and wave his arms in the air. As Officer London pulled into the parking lot, the passenger put something on the ground, leaned into the car to speak to the driver, then shut the car door and walked into the bowling alley. Officer London circled the parked car and noted the object on the ground was a beer can, but did not see whether the can was open or closed. [FN2] London also noted that the driver, defendant John Bradley Nicholas, sat still and kept his head forward until the officer had driven past. As the officer parked and got out of his car, Mr. Nicholas drove out of the lot, making a proper stop at the exit and a lawful right turn onto the street. Officer London followed and pulled Mr. Nicholas over to the curb a short distance from the lot. Officer London described the stop in this testimony:

> FN2. An officer retrieved the can after Nicholas's arrest; the can was closed.

Q. Okay. Officer London, what did you stop the vehicle for?

A. I thought it likely that the driver may have been drinking.

Q. And what factors did you observe that led you to believe that?

A. Well, I saw what I believed was someone getting out of the car with what I thought to be an open container.

Q. And was there anything about the behavior of either of the persons that gave you any suspicion?

A. Well, I noticed the passenger acting strangely but the driver just--I thought it suspicious the way the driver didn't look at me just--

Q. If he had looked at you would that make you suspicious?

A. Well, not necessarily. It just--the driver seemed nervous about me being there.

Q. What was in your mind? What was the reason you pulled the vehicle over?

A. I thought the driver may have been drinking. (emphasis added).

As Officer London approached, Mr. Nicholas opened the driver's side door and asked the officer why he had been stopped. The officer replied he had seen a passenger exit the car with a beer and wondered if Mr. Nicholas had been drinking. If there was a reply to the question, the officer later testified he could not recall it. [FN3]

FN3. Utah law permits drivers to have closed containers of beer in their cars. It is legal to drink from open containers of alcohol in parking lots but not on roadways. Utah Code Ann. § 41-6-44.20 provides: (1) a person may not drink any alcoholic beverage while operating a motor vehicle or while a passenger in a motor vehicle, whether the vehicle is moving, stopped, or parked on any highway; (2) a person may not keep, carry, possess, transport, or allow another to keep, carry, possess, or transport in the passenger compartment of a motor vehicle, when the vehicle is on any highway, any container which contains any alcoholic beverage if the container has been opened, its seal broken, or the contents of the container partially consumed.

Utah law does not specifically forbid a person from driving after having consumed alcoholic beverages. Utah Code Ann. § 41-6-44(2) provides:
(a) A person may not operate or be in actual physical control of a vehicle within this state if the person: (i) has a blood or breath alcohol concentration of .08 grams or greater ... or (ii) is under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle.

Thereafter, events took place that are unnecessary to reiterate here save to note searches of the vehicle occurred leading to the production of evidence supporting the charges filed against the defendant. We need not detail either the events or the products of the searches because the stop is key to what followed. Indeed, because of the testimony of Officer London, the entire case revolves about the validity of the initial stop.

**2 A traffic stop constitutes a seizure within the meaning of the Fourth Amendment; for purposes of constitutional analysis, it is characterized as an investigative detention rather than a custodial arrest. United States v. Botero-Ospina, 71 F.3d 783, 786 (10th Cir.1995), cert. denied, 116 S.Ct. 2529 (1996). An investigative detention must be based upon " 'specific and articulable facts which, taken together with reasonable inferences from those facts, reasonably warrant that intrusion.' " United States v. Lee, 73 F.3d 1034, 1038 (10th Cir.1996) (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)). Reasonable suspicion is determined by the totality

of the circumstances, id.; United States v. Barbee, 968 F.2d 1026, 1028 (10th Cir.1992); but to justify the stop, the detaining officer must have a reasonable articulable suspicion that the detainee has been, is, or is about to be engaged in criminal activity. United States v. Nicholson, 983 F.2d 983, 987 (10th Cir.1993). An officer's unparticularized suspicion or hunch cannot create circumstances giving rise to reasonable suspicion. United States v. Fernandez, 18 F.3d 874, 878 (10th Cir.1994).

We review findings of fact related to a motion to suppress in a light most favorable to the government and set aside those findings only when clearly erroneous. United States v. Davis, 94 F.3d 1465, 1467 (10th Cir.1996). We review de novo, however, the district court's conclusion an officer has a reasonable, articulable suspicion of criminal activity at the time of the seizure. Id. This review is in two steps. First, we determine whether the officer's action was justified at its inception; then, whether the action was reasonably related in scope to the circumstances which justified the interference in the first place. Lee, 73 F.3d at 1038; Botero-Ospina, 71 F.3d at 786. A traffic stop is justified at its inception if "this particular officer has reasonable suspicion that this particular motorist violated 'any one of the multitude of applicable traffic and equipment regulations' of the jurisdiction." Botero-Ospina at 71 F.3d at 787 (citations omitted).

The district court's conclusion Officer London had reasonable suspicion was based upon five factors: (1) the incident occurred early in the morning; (2) the passenger made strange gestures when he exited the car; (3) the passenger placed a beer can on the ground; (4) the defendant did not make eye contact with Officer London, and; (5) the defendant drove out of the parking lot as the officer parked and started to get out of his car. While reasonableness of the officer's conduct is assessed using a totality of the circumstances test, examination of each factor is useful because "[s]ome facts must be outrightly dismissed as so innocent or susceptible to varying interpretations as to be innocuous." Lee, 73 F.3d at 1039.

The time of the incident has little relevance in this analysis. Mr. Nicholas's car was parked in the lot of an establishment that was open for twenty-four hours each day. It is reasonably inferable the business maintained those hours because enough customers frequented it late at night and early in the morning to make its hours of operation appropriate. Had defendant's car been spotted in the lot of an abandoned building, or at least a closed

business, the district court's consideration of the time of day to shroud the incident in suspicion would have been more logical. Second, the connection between the early hour and the likelihood of Mr. Nicholas's intoxication is counter-intuitive. The time of day might be important if Officer London suspected Mr. Nicholas of falling asleep at the wheel, or even of engaging in general malfeasance, but the government offers the early morning hour as evidence to support London's particular suspicion that Nicholas had been drinking. Because the government presented no testimony to explain the basis for this inference, we fail to understand why it is more likely that Mr. Nicholas would have been drinking beer at 5:30 am than at another time of day.

**3 Of equal concern is the evidentiary value of the passenger's odd gestures and possession of a beer. Albeit those facts might have provided Officer London with reasonable suspicion that the passenger had been drinking, but he did not explain, nor can we see, how those acts or any of the passenger's other acts form a constitutionally-sound basis for believing defendant had been drinking. Indeed, courts have long recognized that an individual's mere proximity to questionable or illegal conduct does not imply involvement in that conduct, and may not be used to justify police intrusion. See Sibron v. New York, 392 U.S. 40, 62-63 (1968) (defendant's interaction with known drug addicts over period of eight hours did not create probable cause for officer's subsequent search and seizure); Ybarra v. Illinois, 444 U.S. 85, 91 (1979) ("a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause ... [w]here the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person"); Brown v. Texas, 443 U.S. 47, 52 (defendant's presence in neighborhood frequented by drug users and officer's contention that situation "looked suspicious" did not support finding of reasonable suspicion to stop defendant; specific, objective facts must indicate that particular individual involved in illegal activity).

The government interprets Nicholas's failure to make eye contact with the officer as nervous behavior, presumably suggesting a guilty conscience. This argument is supported neither by logic nor by case law. Involuntary contact with a police officer will often elicit some feeling of anxiety in a law- abiding citizen. Here, Officer London slowly circled Mr. Nicholas's parked car and then stopped directly behind him without indicating any purpose or reason for his interest. We

believe it quite appropriate that Mr. Nicholas would feel some wariness or apprehension in that situation.

Moreover, we have acknowledged that nervousness seldom serves as a reliable factor in determining whether an officer's conduct was justified. In Fernandez, we reminded:

> We have repeatedly held that nervousness is of limited significance in determining reasonable suspicion and that the government's repetitive reliance on the nervousness of either the driver or passenger as a basis for reasonable suspicion in all cases of this kind must be treated with caution.

Id. at 879 (citation omitted). Furthermore, in Barbee, we specifically discounted avoidance of eye contact as suspicious behavior: "[S]uch behavior [passengers sinking down below seat level] is suspicious conduct not clearly susceptible to unsuspicious interpretations, unlike passengers merely avoiding eye contact...." Id. at 1029.

Interestingly, Officer London's testimony reveals the unreliability of this factor. Although he stated that Mr. Nicholas's lack of eye contact raised his suspicion, he almost immediately contradicted himself by conceding that had Mr. Nicholas looked at him instead, Officer London might have found that suspicious as well. [FN4]

> FN4. The Ninth Circuit has remarked that the phenomenon of allowing both eye contact and avoidance of eye contact to qualify as suspicious behavior "put[s] the officers in a classic 'heads I win, tails you lose' position." United States v. Garcia-Camacho, 53 F.3d 244, 247 (9th Cir.1995).

**4 The government argued, and the district court accepted, that Mr. Nicholas's departure from the parking lot after the officer pulled up behind him constituted suspicious behavior, suggesting that act was viewed as an attempt to evade the officer. Yet, defendant's actions were not consistent with that theory. Mr. Nicholas left the parking lot just after his passenger exited from the car and entered the bowling alley. Officer London did not turn on his emergency lights, call out, or indicate in any other way that he expected Mr. Nicholas to remain in the parking lot. Nicholas did not speed out of the lot, and he pulled to the side of the road as soon as London signaled him to stop. Indeed, Officer London did not testify that defendant's departure from the parking lot was unwarranted in any way.

This court already has refused to characterize as

suspicious than that of Mr. Nicholas. The driver in Fernandez, for example, pulled into the emergency lane after noticing a police officer following him. After a quarter mile, the officer pulled into the lane behind him but did not activate his lights. The driver reentered traffic, and the officer switched lanes again and stopped the car. We rejected the government's argument that the driver's conduct constituted evasion, emphasizing that the driver pulled over promptly when signaled by the officer. Fernandez, 18 F.3d at 878-79.

In reliance upon Terry, the government argues while each factor independently constitutes entirely innocent behavior, all the factors taken together transform the situation into veritable opprobrium. But this is not a case like Terry, where the defendants' actions could only be understood when examined as a series of interconnected events. Instead, Nicholas's conduct was appropriate at each separate step as well as within the context of the overall situation. While acknowledging a totality of the circumstances test governs this analysis, we cannot discount completely the fact that none of the individual factors supports a specific, particularized suspicion Mr. Nicholas was committing a crime.

Several additional factors relied upon by the government and the district court. First, Officer London had no prior contact with Mr. Nicholas and had no basis to evaluate his demeanor or the likelihood that he would be drinking at a rather unusual time of day. See United States v. Bloom, 975 F.2d 1447, 1458 (10th Cir.1992) ("we do not understand how Agent Ochoa would know whether defendant was acting nervous and excited or whether he was merely acting in his normal manner"), overruled on other grounds United States v. Little, 18 F.3d 1499 (10th Cir.1994).

Second, Officer London had not received a tip or information from another law enforcement officer that Mr. Nicholas might be engaging in illegal activity. See Adams v. Williams, 407 U.S. 143, 146 (1972) (reasonable suspicion to stop and frisk defendant supported by receipt of tip); Nicholson, 983 F.2d at 987 (reasonable suspicion supported by information and description received from other police officers).

**5 Third, Officer London testified he stopped Mr. Nicholas because he believed he might have been drinking. Consumption of alcohol by persons over the age of twentyone is not a crime; therefore, Officer London, must have meant he stopped Mr. Nicholas because he suspected he was driving under the

influence of alcohol. However, Officer London was unable to recall Mr. Nicholas's response to his specific question, whether he had in fact been drinking, and did not provide any evidence other than his hunch that such was the case. He did not, for example, attempt to substantiate that hunch by performance of field sobriety tests. See Fernandez, 18 F.3d at 881 (finding detention exceeded proper scope and noting officer "administered no roadside sobriety tests; did not request the defendant submit to blood, breath, or urine tests; and issued no citation for driving while impaired").

Furthermore, Officer London described no driving pattern that might support an inference that Mr. Nicholas was driving under the influence of alcohol. Yet, we have consistently relied upon evidence of improper operation of a vehicle to uphold the validity of a traffic stop. See Lee, 73 F.3d at 1038 (straddling lane and lane change supported reasonable suspicion that driver was sleepy or intoxicated; initial stop valid); Botero-Ospina, 71 F.3d at 788 (traveling under speed limit and straddling lane supported reasonable suspicion driver impaired); King, 990 F.2d at 1561 (incessant honking at scene of accident provided justification to detain driver to inform and advise of conditions; initial stop valid). But see Barbee, 968 F.2d at 1029 (listing six factors, but none a moving violation, to support federal agent's reasonable suspicion illegal immigrants were riding in vehicle).

The evidence in this case simply does not support a determination that at the time of the initial stop Officer London had reasonable, particularized suspicion Mr. Nicholas had committed or was committing a crime. The traffic stop, therefore, violated defendant's Fourth Amendment rights. Davis, 94 F.3d at 1468-70. Although the events occurring after the stop demonstrated Mr. Nicholas was in apparent violation of the law, we must constantly remind ourselves a seizure is not made valid by what a subsequent search produces. The judgment of the district court is REVERSED, and the cause is REMANDED with instructions to vacate the conditional plea.

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